Supreme Court, U.S.
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No. 02-349

In The

Supreme Court of the United States

HARLEY E. ROWE,

Petitioner,

v.

CITY OF ELYRIA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

STEPHEN J. GURCHIK*
CITY OF ELYRIA
LAW DIRECTORS OFFICE
328 Broad Street
Elyria, Ohio 44035
(440) 323-5647

* *Counsel of Record*

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STATEMENT OF THE CASE

This is a civil action monetary claim for alleged violations of Plaintiff's civil rights by the City of Elyria and various officials and employees.

In 1995, Mr. Rowe was prosecuted in a civil action to recover costs for false alarms at his business which generated responses by the City of Elyria Police Department to verify whether or not any potential criminal activity was taking place at Mr. Rowe's gas station. The court ruled that the City did not prove the alarms to be false. Mr. Rowe was subsequently prosecuted for failure to obtain a permit for his alarm system. As a result of that action and Mr. Rowe's laundry list of perceived harassment by the City, he filed his complaint in the Federal District Court for the Northern District of Ohio, Eastern Division.

The district court was presented with alleged federal questions pursuant to the Civil Rights Act, 42 U.S.C. Section 1983. The primary claim is based upon the City's purported violation of the 13th Amendment to the United States Constitution to wit: involuntary servitude which inflicted upon him a "badge or incident of slavery". The cause of the involuntary servitude and the badge or incident of slavery was the requirement that he mow the tree lawn in front of his property.

The Defendants filed Motions for Summary Judgment and to Dismiss, which motions were granted on November 30, 2000. The district court found that Mr. Rowe had not produced any genuine issues of material fact which would warrant sending the case to a jury.

Plaintiff has timely perfected his appeals to the Sixth Circuit Court of Appeals which affirmed the findings of the

district court and his appeal to this Court. Plaintiff in his Petition for Writ of Certiorari somewhat nebulously articulates three (3) reasons why this Court should grant the writ. They are:

1. The Decision of the Sixth Circuit is incorrect.

2. The Question Presented is Important.

3. The Decision of the Sixth Circuit Adversely Impacts Members of a Protected Class and Eliminates the Rights of All Persons under the 13th Amendment.

We shall endeavor to address these issues in order.

ARGUMENT

I. The Decision of the Sixth Circuit is Incorrect.

Plaintiff (Petitioner Harley Rowe) in this portion of his Petition for Writ of Certiorari amorphously discusses the requirements for Motions to Dismiss, Fed. R. Civ. P. 12(b)(6) and a Motion for Summary Judgment under Fed. R. Civ. P. 56. In the Sixth Circuit below, Mr. Rowe argued that the City was singling him out, i.e., selectively enforcing various city codes against only him. The Sixth Circuit correctly stated what a plaintiff must establish to prevail upon a claim of selective enforcement.

1. The Plaintiff must make at least a prima facie case showing that similar persons outside plaintiff's category were not prosecuted. *Stempler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997).

2. The public official must initiate the prosecution with a discriminatory purpose. *Gardenhire v. Schubert*, 205 F.3d 303, 318 (6th Cir. 2000) (quoting *Futerneck v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir. 1996)).

3. The prosecution must have a discriminatory effect on the group to which plaintiff belongs. *Gardenhire* supra.

In the instant case, Mr. Rowe has completely failed to show that any persons outside his category were not prosecuted. Mr. Rowe argued that he provided a list of persons he *believed* (emphasis ours) were not prosecuted under the grass mowing ordinance. As the Sixth Circuit pointed out Mr. Rowe had a duty to come forward with evidence to support his claim. Second, Mr. Rowe has failed to show that anyone initiated a prosecution for a discriminatory purpose. Third, he has failed to show any discriminatory effect upon the group to which Mr. Rowe allegedly belongs. In fact, he never does establish, even in his pleadings, the group to which he purportedly belongs.

Mr. Rowe then argues that the City's mowing ordinance is unconstitutional on its face and as applied to him. The law favors a finding of constitutionality so long as a rational relationship exists between the terms of the ordinance and a legitimate governmental purpose. *Berger v. City of Mayfield Heights*, 154 F.3d 621, 624 (6th Cir. 1998). He has presented no evidence that the mowing ordinance was not serving a legitimate governmental purpose, i.e., aesthetics, vermin control and traffic safety.

Except for vague allegations that certain public officials were out to get him, Mr. Rowe articulates no facts upon which to predicate this portion of his claim. Mr. Rowe complains that the City cited his property for various maintenance code violations but admitted that the property did look "kind of rough", had peeling paint and holes in the parking lot. Plaintiff was served with notice of violations, renovated the property, and was never charged nor fined for the violations. Mr. Rowe was served notice of

violations of signage ordinances and voluntarily removed the portable lighted sign from his tree lawn, and the signs on the fence were ultimately determined to be on a City owned fence and the City removed them at its own expense. No enforcement action was taken. Plaintiff complained about inspection fees for gas pumps, but admitted that the City did have an interest in regulating gasoline service stations within its jurisdiction. Mr. Rowe complains that the City by closing West River Road for a sewer construction project damaged him. His argument that the road work could have been done without closing the road is merely a substitution of his judgment for that of the City Engineer.

Last, the only prosecution to which the Plaintiff was subjected was a violation of a city ordinance which required that a permit for the issuance of a burglar alarm be taken out before it was registered with the Police Department. Mr. Rowe refused to take out the permit, was prosecuted, found guilty and fined. He ultimately paid the fine.

II. The Question Presented is Important.

The main thrust of this argument seems to be that the mowing ordinance should be declared unconstitutional because there was no rational basis yet concedes that it would be constitutional unless it is arbitrary or unreasonable. See Petition for Writ, p. 6. However, he utterly fails to state why or how the ordinance is unreasonable or arbitrary. Presumably, he argues that it is being enforced against him alone as a "class of one" but he fails to demonstrate that others similarly situated have not been prosecuted. As such, his "class of one" claim should be rejected. His other argument is that a city official drove by and

determined by glancing the grass to exceed twelve (12) inches was arbitrary. Yet the Plaintiff admitted that he was; a) aware of the ordinance; b) it applied to his property; c) had no knowledge of whether or not the grass or weeds violated the ordinance; d) did not personally inspect the property. However, he made arrangements to mow the property, but did not do so within the five (5) days required by the ordinance. Thus, his arguments as to unreasonableness or arbitrariness fall short of a constitutional challenge.

III. The Decision of the Sixth Circuit Adversely Impacts Members of a Protected Class and Eliminates the Rights of All Persons Under the 13th Amendment.

Mr. Rowe raises for the first time that he is a member of a "class of one". See Petition for Writ of Certiorari, P. 6.

The issue of a protected class was not alleged in Plaintiff's complaint nor in response to defendant's motions. He has simply not articulated in any meaningful manner that he belongs to any identifiable group which has been prosecuted while other similarly situated persons were not prosecuted. Mr. Rowe is alleging that by requiring him to mow the grass in the tree lawn or pay a fine inflicts upon him a "badge or incident of slavery". This Court has addressed the issue of "involuntary servitude". In the case of *United States v. Kozminski*, 487 U.S. 931, 942 (1988) this Court found that involuntary servitude was not limited to the abolishment of African slavery but was extended "those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results." The Court went on to say:

> "Similarly, the Court has recognized that the prohibitation against involuntary servitude does not prevent the state or federal government from compelling their citizens by threat of criminal sanction, to perform certain civic duties. . . ," 487 U.S. at 943-44.

Thus, enforcement of a mowing ordinance does not rise to the level compulsion which is " . . . akin to African slavery which in practical operation would produce like undesirable results." 487 U.S. at 942.

The City of Elyria argues to this Court that Mr. Rowe's laundry list of perceived violations of his civil rights are nothing more than the complaints of a disgruntled citizen and none of his complaints rises to the constitutional level which he contends. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN J. GURCHIK
Attorney for City of Elyria, et al.